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UNCLAS OTTAWA 003133

SIPDIS

SENSITIVE

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E.O. 12958: N/A

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SUBJECT: RESOLVING OUR DIFFERENCES ON DEVILS LAKE

1. At the top of our environmental agenda's list of unfinished business and disastrous consequences of inaction is Devils Lake. With the U.S. elections now behind us and the President planning to visit Ottawa later this month, it is time for us to revisit this issue and our long-overdue response to the Canadian request that it be referred to the International Joint Commission (IJC) for study and recommendations. The Prime Minister and other senior Canadian officials have raised the Devils Lake issue repeatedly and they are likely to raise it again during the President's upcoming visit. In the past, we always had the luxury of putting off a decision pending the outcome of various legal challenges and the fact that no water transfer was imminent. We no longer have the luxury of delaying our decision. North Dakota's outlet is expected to be completed shortly and the state reportedly will be ready to start pumping water into the Sheyenne River next spring.

2. It is the Embassy's view that a reference on Devils Lake to the IJC is in the best interests of both countries and offers an opportunity to resolve our differences amicably. The IJC was created under the Boundary Waters Treaty for just this type of situation. Unfortunately, the Canadians were unwilling to move ahead with a reference when we made the initial proposal a couple of years ago. In April this year, they recognized their mistake (although they wouldn't put it quite that way) and requested a broad reference on Devils Lake and other water issues involving North Dakota.

3. While we see no basis for including those other North Dakota water issues or the proposed federal outlet project at Devils Lake, which was the subject of a separate review process for compliance with the Boundary Waters Treaty (BWT), we should agree to a reference on the state outlet at Devils Lake, strictly limited in scope and time frame. Failure to do so will leave us open to Canadian accusations that the state outlet does not comply with U.S. obligations under the BWT and could lead to acts of retaliation by the provincial government of Manitoba. The Premier of Manitoba reportedly has asked his engineers to look at the possibility of blocking some cross-border water flows if North Dakota starts pumping water from Devils Lake. This issue clearly has the potential to become a major irritant between our two countries. Premier Doer has, however, said that he would abide by the outcome of an IJC reference on this issue, a position which represents significant movement on his part. Both countries rely heavily on the BWT to challenge projects and activities that could potentially pollute our shared water resources. It is important in this case, that we act to preserve confidence in the treaty.

4. We recognize the damage that rising water levels and flooding have caused in North Dakota around Devils Lake. The state and federal governments have had to expend hundreds of millions of dollars to move buildings, rebuild roads and dikes and compensate farmers and local residents. We would like to see the state project proceed, but we should be sure that it complies with our treaty obligations to Canada before it begins pumping water. Therefore, we propose that the U.S. position contain the following elements.

a) We should agree to a joint reference to the IJC, limited in scope to the state outlet and strictly limited in its time frame.

b) We should further frame the reference so as not to derail the state outlet. If the IJC finds that the outlet fails to meet U.S. obligations under the BWT, its recommendations should be directed at what can be done to correct deficiencies.

c) The reference should address the still outstanding issue of the possible transfer of invasive species not already in the Sheyenne and Red Rivers. A biota study, as provided for in the Secretary's letter of January 2004 on the proposed federal outlet, is a must, but it should be on a very tight time schedule to avoid unnecessarily delaying operation of the state outlet.

5. The Canadians are likely to raise Devils Lake during the President's visit, either directly with the President or

separately in the Secretary's meetings. We should be prepared to give the Canadians a positive response to their request for a reference to the IJC along the lines noted above.

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